UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE INTERPUBLIC SECURITIES LITIGATION	02 CIV. 6527 (DLC) OPINION AND ORDER

Appearances:

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DENISE COTE, District Judge:

Defendant Interpublic Group of Companies, Inc. ("IPG") is a publicly-traded holding company that provides a range of advertising and marketing services to corporate clients. This class action, alleging violations of federal securities law, is brought against IPG and several of its former and current senior executives. The first action against IPG was filed on August 15, 2002. The class actions were consolidated and Private Asset Management was appointed lead plaintiff ("Lead Plaintiff") on November 15. A Consolidated Amended Complaint ("Complaint") was filed on January 10, 2003. The Complaint alleges claims under Sections 11 and 15 of the Securities Act of 1933, 15 U.S.C. §§ 77k, 77o, Sections 10(b) and 20(a) of the Securities Exchange Act

of 1934, 15 U.S.C. §§ 78j(b), 78t(a), and the rules and regulations promulgated thereunder by the Securities and Exchange Commission.

Plaintiffs now move for (1) certification of a class consisting of persons who purchased IPG common stock between October 28, 1997 and October 16, 2002, inclusive (the "Purchaser Class"), and (2) certification of a class consisting of persons who acquired shares of IPG common stock in exchange for shares of True North Communications common stock pursuant to IPG's Form S-4 registration statement filed on April 9, 2001 and amended on May 9, 2001 (the "True North Class"). Plaintiffs also move for the appointment of Lead Plaintiff as the class representative for the Purchaser Class and plaintiff Doyle G. McClain ("McClain") as the class representative for the True North Class.

Defendants do not oppose certification of either class, nor the appointment of Lead Plaintiff and McClain as their respective class representatives. The sole issue in dispute is the relevant class period. Defendants submit that the class should be limited to those persons who purchased or otherwise acquired IPG shares before August 13, 2002. This would shorten the class period by approximately two months. For the reasons that follow, the plaintiffs' motion is granted.

Background

On March 29, 2003, the defendants' motion to dismiss was largely denied. See In Re Interpublic Sec. Litigation, No. 02

Civ. 6527 (DLC), 2002 WL 21250682 (S.D.N.Y. Mar. 29, 2003) ("March 29 Opinion"). Familiarity with the March 29 Opinion is assumed.

The facts most relevant to this motion and as alleged in the Complaint are as follows. After announcing on August 5, 2002, that it would be delayed in releasing its second quarter results, IPG became engulfed in an accounting scandal when it disclosed in a press release issued on August 13 ("August 13 Press Release") that it had overstated its financial results from 1997 through the first quarter of 2002 by $68.5 million. IPG declared it would have to issue a restatement ("Restatement") of its earnings.

In an August 13 conference call, IPG's Chief Financial Officer explained to investors that $68.5 million was the "total" and "final" charge for these accounting irregularities, that the accounting problems were primarily located in its European subsidiaries, and that the amounts involved were not material to any prior period. IPG insisted that these "accounting effects" would "have no impact on cash flow in the present or for that matter in the past, and do not have any implications on future performance." Despite assurances that the amount of the Restatement was final, IPG executives announced, after the market closed on October 16, that the Restatement amount would actually be in the $120 million range ("October 16 Announcement"). On the

following day, IPG's stock price dropped by 30 percent.[1] On November 13, IPG again revised the total, announcing that the final amount of the Restatement would be $181.3 million.

Discussion

Rule 23 Prerequisites

In reviewing a motion for class certification, the question is not whether the plaintiff has "stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met." Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 178 (1974) (citation omitted); In re Visa Check/MasterMoney Antitrust Litig., 280 F.3d 124, 135 (2d Cir. 2001). The plaintiff bears the burden of establishing the requirements of Rule 23, Fed. R. Civ. P. Amchem Products, Inc. v. Windsor, 521 U.S. 591, 614 (1997); Caridad v. Metro-North Commuter Railroad, 191 F.3d 283, 291 (2d Cir. 1999). The four prerequisites set forth in Rule 23(a) are as follows:

> (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Rule 23(a), Fed. R. Civ. P.

In addition, the plaintiffs in this case must establish that

[1] The price of IPG shares had dropped by 24% after it announced on August 5 that it would be delaying the announcement of its earnings.

a class action may be maintained under Rule 23(b)(3), which requires a finding "that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Rule 23(b)(3), Fed. R. Civ. P. The Rule 23(b)(3) predominance inquiry is more demanding than the commonality determination required by Rule 23(a). Moore v. PaineWebber, Inc., 306 F.3d 1247, 1252 (2d Cir. 2002). A Rule 23(b)(3) action is "designed to secure judgments binding all class members save those who affirmatively elect[] to be excluded," where a class action will "achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results." Amchem Products, 521 U.S. at 614-15 (citation omitted). Plaintiffs here clearly meet all the requirements of Rule 23(a) and 23(b)(3), a finding that the defendants do not oppose.

Rule 23(a)(1)

To satisfy the numerosity requirement of Rule 23(a), plaintiffs must show that joinder is "impracticable," not that it is "impossible." Robidoux v. Celani, 987 F.2d 931, 935 (2d Cir. 1993). The numerosity requirement is presumed satisfied by a class consisting of 40 or more members. Consolidated Rail Corp. v. Town of Hyde Park, 47 F.3d 473, 483 (2d Cir. 1995).

Plaintiffs in this case clearly satisfy the numerosity requirement. IPG stock is publicly held and actively traded on the New York Stock Exchange. As of March 25, 2002, there were 380,213,714 shares of IPG stock issued and outstanding. The number of persons who purchased or otherwise acquired IPG stock during the proposed class period is estimated to be in the "thousands." The putative class consists of a sufficient number of persons to make joinder impracticable.

Rule 23(a)(2)

For class certification, there must be an issue of law or fact common to the class. Robinson v. Metro-North Commuter Railroad Co., 267 F.3d 147, 155 (2d Cir. 2001). Plaintiffs have raised a number of common issues of law and fact. Among them are whether IPG's public filings and statements contained material misstatements, whether the defendants acted knowingly or with reckless disregard for the truth in misrepresenting material facts in IPG's public filings and press releases, and whether the damages to the investors were caused by the defendants' misstatements.

Rule 23(a)(3)

Class representatives must have claims typical of the claims of the class. Rule 23(a)(3), Fed. R. Civ. P. The purpose of both the typicality and commonality requirements is to ensure that "maintenance of a class action is economical and that the

named plaintiff's claims and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." Gen. Tel. Co. of the Southwest v. Falcon, 457 U.S. 147, 157 n.13 (1982). The typicality requirement is satisfied when "each class member's claim arises from the same course of events, and each class member makes similar legal arguments to prove the defendant's liability." Robinson, 267 F.3d at 155 (citation omitted). The factual background of each named plaintiff's claim need not be identical to that of all of the class members as long as "the disputed issue of law or fact occup[ies] essentially the same degree of centrality to the named plaintiff's claim as to that of other members of the proposed class." Caridad, 191 F.3d at 293 (citation omitted). "When it is alleged that the same unlawful conduct was directed at or affected both the named plaintiff and the class sought to be represented, the typicality requirement is usually met irrespective of minor variations in the fact patterns underlying individual claims." Robidoux, 987 F.2d at 936-37.

Plaintiffs allege that the defendants distributed materially false and misleading information that artificially inflated the price of IPG's common stock throughout the class period. The defendants' alleged course of conduct is central to the claims of both the Purchaser and True North classes and its named representatives. The claims of Lead Plaintiff and McClain will be typical of the claims of their respective classes. Both of the classes and its representatives will necessarily seek to

develop facts sufficient to prove IPG's underlying accounting fraud and subsequent dissemination of material misrepresentations regarding the company's projected Restatement, and to show why the misrepresentations were made.

Rule 23(b)(4)

Class representatives must also adequately protect the interests of the class. A class representative must "possess the same interest and suffer the same injury as the class members." Amchem Products, 521 U.S. at 625-26 (citation omitted). "[A]dequacy of representation entails inquiry as to whether: 1) plaintiff[s'] interests are antagonistic to the interest of other members of the class and 2) plaintiff[s'] attorneys are qualified, experienced and able to conduct the litigation." Baffa v. Donaldson, Lufkin & Jenrette Sec. Corp., 222 F.3d 52, 60 (2d Cir. 2000).

Here, both Baffa criteria would appear to be satisfied. As described in this motion, Lead Plaintiff and McClain's interests are directly aligned with those of the absent class members they seek to represent: they are purchasers or acquirers of IPG stock who suffered significant losses as a result of the defendants' alleged course of conduct. In their brief in support of this motion, plaintiffs' counsel contends that McClain, similar to all other former holders of True North common stock, exchanged his True North shares for shares of IPG common stock at an

artificially inflated price.[2] Both Lead Plaintiff and McClain therefore are expected to prosecute the class claims vigorously. In addition, plaintiffs' attorneys are qualified and experienced in securities litigation. The defendants do not contest the proposed class representatives' qualifications under either of the two Baffa criteria. See Baffa, 222 F.3d at 60.

Rule 23(b)(3)

The Rule 23(b)(3) "common questions" inquiry "trains on the legal or factual questions that qualify each class member's case as a genuine controversy...[and] tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." Amchem Products, 521 U.S. at 623; see also Blyden v. Mancusi, 186 F.3d 252, 270 (2d Cir. 1999). The predominance of common questions will be established if "resolution of some of the legal or factual questions that qualify each class member's case as a genuine controversy can be achieved through generalized proof, and if these particular issues are more substantial than the issues subject only to individualized proof." Moore, 306 F.3d at 1252 (2d Cir. 2002). The Supreme Court has noted that the predominance requirement "is a test readily met in certain cases alleging consumer or securities fraud." Amchem Products, 521 U.S. at 625. Factors

[2] Because defendants do not oppose McClain serving as the representative of the True North Class, plaintiffs have not submitted any evidence about McClain or his qualifications to serve as class representative.

relevant to the superiority of a class action include:

> (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; [and] (D) the difficulties likely to be encountered in the management of a class action.

Rule 23(b), Fed. R. Civ. P. These factors are "nonexhaustive." Amchem Products, 521 U.S. at 615.

Plaintiffs here have shown that common questions of law and fact predominate. The interest of the two classes as a whole in litigating the many common questions substantially outweighs any interest by individual members in bringing and prosecuting separate actions. As previously noted, the plaintiffs suffered similar injuries resulting from the same alleged course of conduct. All plaintiffs will rely on the same or substantially similar documents, statements, and legal theories to prove the defendants' liability. Furthermore, a class action is the superior method for the fair and efficient adjudication of this controversy. The classes here potentially include thousands of plaintiffs. Litigating each case separately would be wasteful, and potentially result in delay and an inefficient expenditure of judicial resources. Many investors will be unable to seek redress of their claims except through the class action device. Forcing each investor to litigate separately would also risk disparate results among those seeking redress.

The Class Period

The only issue in dispute in certifying the class is the relevant class period. As noted, the plaintiffs claim that the class includes all persons who purchased or otherwise acquired IPG stock from October 28, 1997 up to and including October 16, 2002. Defendants contend that the class should only encompass qualified plaintiffs who purchased or acquired the stock up to, but not including, August 13, 2002. Defendants argue that the August 13 Press Release was a "curative disclosure" that put plaintiffs and the market on notice of the need for a Restatement. As such, any plaintiffs who purchased or acquired IPG stock on or after August 13, 2002 were "fully aware" of the accounting irregularities at issue here and could not have reasonably relied on the alleged misrepresentations in IPG's public filings.

Class certification of a broader class period is appropriate when questions of fact remain as to whether a purportedly curative press release effected a complete cure of the market or was itself fraudulent. Sirota v. Solitron Devices, Inc., 673 F.2d 566, 572 (2d Cir. 1982). It cannot be concluded, as a matter of law, that the August 13 Press Release "'cured the market,' thereby requiring the Court to cut off the class period at that date." In re AMF Bowling Sec. Litig., 99 Civ. 3023 (DC), 2002 WL 1033826, at *1 (S.D.N.Y. May 21, 2002) (citation omitted). Whether the press release and the accompanying conference call, which claimed that $68.5 million represented the

"total" and "final" amount of the inaccuracies, unequivocally revealed the existence of an on-going accounting failure at IPG, or whether it was itself misleading or fraudulent, is a substantial and disputed issue of fact. Indeed, that IPG stock lost 30% of its value immediately following the October 16 Announcement is evidence that the August 13 Press Release did not fully disclose the extent of the inaccuracies to the public.

Moreover, the fact that some members of the Purchaser Class will have bought before the August 13 Press Release and some after it does not defeat the certification of the broader class period. Even where there are some individualized damage issues, class certification is appropriate so long as liability can be determined on a class-wide basis. "[A]s long as a sufficient constellation of common issues binds class members together, variations in the sources and application of a defense will not automatically foreclose class certification." In re Visa, 280 F.3d at 138 (citation omitted). If individualized damage issues do arise, an appropriate allocation may be made at a later stage, and, if necessary, subclasses may be created for the determination of damages.

Defendants' reliance on Klein v. A.G. Becker Paribus, Inc., 109 F.R.D. 646 (S.D.N.Y. 1986), as support for a shortened class period is misplaced. The Klein court found that a company press release in fact cured the alleged misrepresentations in the prospectus, but extended the class period by three days to include a significant amount of information that became available

to investors in those days. Id. at 648, 653. Here, the plaintiffs contend that the conference call accompanying the August 13 Press Release misrepresented the nature of IPG's accounting difficulties by claiming that the disclosed figures were "final," and that the misrepresentations and omissions on which they sue were not fully disclosed during the class period.

Conclusion

The Rule 23(a) and (b)(3) requirements for certification of a class action have been satisfied. The plaintiffs' motion to certify both classes is granted. Lead Plaintiff Private Asset Management is approved as the class representative for the IPG Purchaser Class. The plaintiffs shall submit sufficient evidence by November 14, 2003, to permit the Court to determine whether to appoint plaintiff Doyle G. McClain as the class representative for the True North Class. The class period will consist of persons who purchased or otherwise acquired IPG stock between October 28, 1997 and October 16, 2002, inclusive.

SO ORDERED:

Dated: New York, New York
November 6, 2003

DENISE COTE
United States District Judge